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IMPEACHMENT TRIAL PROCEDURES

HEARING

BEFORE THE

COMMITTEE ON RULES AND ADMINISTRATION UNITED STATES SENATE

ONE HUNDRED FIRST CONGRESS

FIRST SESSION

ON

THE APPROPRIATE USE OF RULE XI OF THE RULES OF PROCEDURE AND PRACTICE IN THE SENATE WHEN SITTING ON IMPEACHMENT TRIALS IN THE IMPEACHMENT OF JUDGE ALCEE L. HASTINGS, AND ANY OTHER MATTER WHICH MAY ASSIST THE SENATE IN A FAIR TRIAL OF THE PENDING IMPEACHMENT

JANUARY 26, 1989

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IMPEACHMENT TRIAL PROCEDURES

THURSDAY, JANUARY 26, 1989

U.S. SENATE,
COMMITTEE ON RULES AND ADMINISTRATION,
Washington, DC.

The Committee met, pursuant to notice, at 9:35 a.m., in room 301, Russell Senate Office Building, Hon. Wendell H. Ford, chairman, presiding.

Present: Senators Ford, Pell, Byrd, Inouye, DeConcini, Gore, Moynihan, Dodd, Adams, Stevens, Hatfield, Helms, and McConnell.

Staff present: James O. King, staff director; William McW. Cochrane, senior adviser; John L. Sousa, chief counsel; Gail S. Martin, chief clerk; Wayne A. Schley, minority staff director; Carole J. Blessington, assistant chief clerk; Virgil Webb, majority counsel; Constance H. Friedman, staff assistant; and Bill Canfield, minority counsel.

The CHAIRMAN. First, let me welcome to the Committee my colleague from Kentucky, Senator McConnell. It is the first time he has exercised his prerogative for a Class B Committee. He chose the Rules Committee and I could not understand why. We want you to participate and we appreciate your attendance here this morning.

Senator MCCONNELL. Thank you, Mr. Chairman. Glad to be here.

The CHAIRMAN. We are meeting this morning at the direction of the Senate, pursuant to Senate Resolution 480, to consider procedural recommendations for the impeachment of Judge A.L. Hastings. That resolution requires the Rules Committee to conduct a hearing on the appropriate use of Rule XI of the Senate Impeachment Rules, in the trial of this impeachment and on any other matter that might assist the Senate in a fair trial of the impeachment.

It is not our purpose to make any judgment on the merits of this impeachment. We are here to give both sides an opportunity to present their views on the procedural matters that we have been directed by the Senate to consider. It is our objective to make recommendations that assure that this Senate impeachment proceeding is fair.

Our witnesses this morning will be the House Managers and lawyers for Judge Hastings. Senator Stevens.

Senator STEVENS. Mr. Chairman, I have no prepared statement. I have gone over the memoranda and materials that you have presented to us and I am prepared to proceed on the basis of your suggestions.

The CHAIRMAN. Does any other member wish to make a statement before we call the witnesses? There are no statements. Therefore, we will proceed to the witnesses.

The witnesses will be the Members of the House of Representatives, the Honorable Jack Brooks; John Conyers, Jr.; Don Edwards; John Bryant; Hamilton Fish, Jr.; and George W. Gekas. Will you gentlemen come forward. Mr. Bryant, will you be the spokesman?

Mr. BRYANT. Yes, Mr. Chairman.

The CHAIRMAN. Fine. You may proceed.

STATEMENT OF A PANEL CONSISTING OF HON. JACK BROOKS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF TEXAS; HON. JOHN CONYERS, JR., A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MICHIGAN; HON. DON EDWARDS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA; HON. JOHN BRYANT, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF TEXAS; HON. HAMILTON FISH, JR., A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEW YORK; AND HON. GEORGE W. GEKAS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF PENNSYLVANIA; ACCOMPANIED BY ALAN I. BARON, SPECIAL COUNSEL, COMMITTEE ON THE JUDICIARY, U. S. HOUSE OF REPRESENTATIVES

Mr. BRYANT. Thank you, Mr. Chairman. I appear before the Committee today as lead counsel for the House of Representatives in presenting evidence in support of 17 Articles of Impeachment voted by the House of Representatives against U.S. District Judge Alcee L. Hastings.

This matter began in March of 1983 when two U.S. District Judges filed a complaint with the Chief Judge of the 11th Circuit alleging that Judge Alcee Hastings engaged in a conspiracy to accept a bribe and alleging multiple cases of abuse of office. A judicial investigating committee was formed consisting of three circuit judges and two district judges of the 11th Circuit.

This committee retained as counsel the distinguished John Doar, a former head of the Civil Rights Division of the Justice Department during the 1960's, who prosecuted the murderers of Goodman, Schwerner and Chaney, the three civil rights workers murdered in Mississippi, and who served as special counsel to the Judiciary Committee during the Watergate impeachment hearings.

With his guidance, this committee took testimony from over 100 witnesses; compiled 2,800 exhibits; and issued a detailed, 500-page report unanimously concluding that Judge Alcee Hastings had indeed participated in a conspiracy to accept a bribe, and that he had committed multiple acts of perjury and falsification of documents during his criminal trial for this same matter, for the purpose of obtaining an acquittal.

This report was forwarded to the Judiciary Council of the 11th District, consisting of 15 circuit and district judges, and after studying the report and the evidence before them, they voted unanimously to adopt the conclusion of the report, that Judge Hastings participated in a conspiracy to accept a bribe and committed multiple acts of perjury and falsification of documents during his criminal trial.

Their report was then forwarded to the Judicial Conference of the United States, headed by the Chief Justice and including the chief judges of the various circuits. They also voted unanimously to adopt the recommendations in the report, and upon doing this, certified the report containing the conclusions to the Speaker of the House of Representatives.

In March of 1987, the matter was referred to the House Subcommittee on Criminal Justice and the matter was investigated for over a year, including the review of thousands of documents, the interviewing of dozens of witnesses, and finally, seven full days of hearings in which testimony was received from 12 witnesses, including John Doar. Judge Hastings was given a full opportunity to participate. He was invited to testify, but he declined to do so.

Our Subcommittee voted unanimously to recommend to the House 17 Articles of Impeachment—conspiracy to accept a bribe; 14 instances of perjury and fabrication of evidence for the purpose of misleading the jury and obtaining an acquittal in the criminal case against him; illegal disclosure of confidential wire tap information to a person who was mentioned in the course of the surveillance, which had the effect of terminating several undercover investigations and endangering the lives of undercover operatives working for law enforcement agencies; and finally, a general article of impeachment alleging unfitness for office as a result of his wrongful conduct.

By a vote of 413 to three, the House adopted the Articles of Impeachment which are before the Senate at this time. Mr. Chairman, our presentation to this Committee, with regard to the procedures you are to follow in trying this matter, is in three parts. The first part will be presented to you by the Chairman of the Criminal Justice Committee during the 100th Congress, the Honorable John Conyers of Michigan.

The CHAIRMAN. Congressman Conyers.

Mr. CONYERS. Thank you, Mr. Chairman and the distinguished Rules Committee. I am here on behalf of the House of Representatives and we would like to thank the Senate Committee on Rules and Administration for this opportunity to present our views as to what procedures the Senate may want to employ in the impeachment trial of Judge Alcee Hastings.

I would like to state from the outset that the House does not take a position on the issue of whether Judge Hastings' trial should proceed before the full Senate or before a committee appointed pursuant to Rule XI of your Rules. The House recognizes the Senate's authority to choose either alternative and there is ample precedent for both.

Early impeachment trials were conducted before the full Senate. More recently, a committee was appointed, pursuant to Rule XI, in the impeachment of Judge Claiborne. The House is prepared to bring its case before whichever body the Senate chooses to hear the evidence.

In his written submissions to this Committee, Judge Hastings has argued extensively that the full Senate should hear the evidence because the procedures employed by the House of Representatives in its impeachment proceeding were unfair to the accused and did not adhere to the constitutional principles.

That is a little bit painful for me because I am disappointed that with all the exceptions, accommodations, rule-bending, and privileges granted counsel and Judge Hastings, they all apparently amounted to nought and that our generosity, in the course of the hearing, meant very little apparently.

As the Managers for the House of Representatives, we must take issue with the Judge's characterization of our proceedings. We would be lax in our duties if we did not defend the House of Representatives against such a charge. There is absolutely no basis for the contention that the procedures employed by the House require this case to be tried before the full Senate, for the House conducted its investigation in a manner that was exceedingly fair; was consistent with precedent; and most important, was protective of the rights of the accused.

What the respondent apparently fails to recognize is that our role was a limited one. Pursuant to Article I, Section 2 of the Constitution, the House of Representatives was to conduct a factual investigation merely to determine whether Articles of Impeachment should be brought. We engaged in the first stage of the constitutional process. We were not to conduct a trial, for that is the Senate's exclusive constitutional function.

We discharged our duty with fairness and from a position of neutrality. Like any other type of investigation, the House investigation into the facts of this case did not employ trial procedures. To use such procedures would have been inappropriate. The Subcommittee on Criminal Justice, however, wanted to make sure that Judge Hastings was represented.

For that reason, we allowed him and his counsel to participate fully in our hearing, including the questioning and calling of witnesses. Judge Hastings even addressed the Subcommittee and we gave him the opportunity to develop additional information for our review. Our investigation proceeded in a manner consistent with precedent and with an extreme concern for fundamental fairness.

The House of Representatives' investigation led to the conclusion that Judge Hastings should be impeached. The evidence establishes that his conduct warrants removal from office. The Managers, therefore, are ready to bring before the Senate the case against Judge Hastings. We will present the evidence before the full Senate or a committee appointed pursuant to Rule XI of the Senate Impeachment Rules, whichever choice the Senate and the Rules Committee makes. Thank you.

Mr. BRYANT. Mr. Chairman, Congressman Hamilton Fish, the ranking Republican member of our Subcommittee, will proceed at this time, with your consent.

The CHAIRMAN. Fine. Congressman Fish.

Mr. FISH. Mr. Chairman and members of the Committee. The House recognizes that it is within the Senate's sole discretion to establish the governing procedures. The suggestions we make here today are just that—suggestions of procedures the Senate may wish to consider in order to ensure a fair and timely resolution of the pending case.

As we have made clear in our written submissions to the Committee, the House of Representatives suggests the Senate adopt a two-stage process. The first stage would be a pretrial proceeding

during which any motion that seeks to dispose of one or more of the Articles of Impeachment would be briefed and argued by the parties, and subsequently resolved by the Senate.

We believe, Mr. Chairman, that the full Senate would have to decide any dispositive motions. However, either the full Senate or a committee could oversee the briefing schedule and conduct a hearing, during which the arguments of the parties would be presented. And if the Senate chooses to use a committee during this part of the impeachment proceedings, it could also ask the committee to make a recommendation on the motions.

The second stage of the pending impeachment would be the presentation of evidence. During this second stage, pretrial matters of more limited scope would be resolved. The trial would be conducted and all evidentiary motions would be briefed, argued and decided. The House of Representatives takes no position with respect to whether the trial should be conducted before the full Senate or a committee appointed pursuant to Rule XI of the Senate Impeachment Rules.

But if the Senate appoints a committee pursuant to Rule XI, we suggest that that committee be explicitly authorized to resolve all evidentiary matters. One major concern with respect to the second stage of the pending impeachment, Mr. Chairman, is that the trial be conducted before a single body.

The House urges this Committee to recommend to the Senate that all the evidence should be presented to either the full Senate or to a Rule XI committee, but not to a combination of the two. We feel this is an important procedure to adopt because bifurcating the presentation of the evidence runs a significant risk that more weight will be given to evidence presented to the full Senate than that presented to the committee.

In addition, there is the risk that evidence may be taken out of context and therefore, the House of Representatives asks this Committee to recommend a procedure whereby all the evidence would be presented to a single body.

Finally, Mr. Chairman, the House suggests two additional procedures which we respectfully believe will contribute to narrowing the issues and to the expeditious resolution of the trial. We believe that these suggested procedures are consistent with Section Four of Senate Resolution 480 encouraging stipulations by the parties.

First, we ask the Committee to recommend to the Senate a rule establishing that any proposed stipulation of fact filed with the Senate by one of the parties to this proceeding will be accepted as true, unless the opposing party files a written objection, including a proffer as to why the proposed stipulation of fact should not be taken as true. Such a rule would eliminate the need for testimony concerning the facts that are not seriously in dispute.

Second, the House suggests a similar procedure with respect to the many documents that are part of this case. We suggest the adoption of a rule whereby any stipulation as to the admissibility of a document which is filed with the Senate by one of the parties to this proceeding be accepted as true, unless the opposing party files a written objection again, including a proffer as to why the proposed stipulation should not be taken as true.

Mr. Chairman, we believe that both of these procedures, along with the others that we have mentioned, will help ensure timely and just resolution of the pending impeachment proceeding.

Mr. BRYANT. Mr. Chairman, in this impeachment proceeding, the Senate must determine whether Judge Hastings has committed the acts alleged and whether those acts constitute acts warranting removal from office.

In his submission to the Committee, Judge Hastings has emphasized his acquittal by a criminal jury on the allegation that he participated in a conspiracy to accept a bribe. First, he argued that this jury verdict requires that we not take up impeachment proceedings on this article at all. Second, he has argued that it requires the Senate to proceed with an impeachment trial before the full body.

I want to emphasize today, more than any other point, that it is the opinion of the House that this acquittal was obtained through the conscious use of perjured testimony and fabrication of physical evidence. It is established law that the acquittal should play no part in these proceedings. In both a legal and constitutional sense, the jury verdict is irrelevant to your decision regarding what procedures to recommend, and to your ultimate decision whether to convict Judge Hastings on any of the Articles of Impeachment.

The trial that the Senate will conduct in this case is neither dependent upon nor related to the criminal trial. It is important to emphasize that many of the Articles presented by the House of Representatives contain charges that were never presented to and never decided by the jury. More importantly, the Constitution itself clearly establishes, in Article I, Section 3, Clause 7, that the impeachment trial is independent of the criminal case.

Finally, the Senate impeachment trial and the criminal prosecution serve two very different and important functions. The distinction is important to keep in mind. The primary goal of the criminal proceeding is personal punishment. The impeachment process, in contrast, is remedial in nature. It serves an entirely different purpose of having the Legislative Branch determine whether the conduct of a public officer, in this case a Federal judge with lifetime tenure, has betrayed the trust of the American people and has compromised the public's trust in our Government.

Unlike any criminal procedure, the Senate impeachment trial will ensure the integrity of the Federal judiciary and, in fact, it is the public's only method of redressing misbehavior by a Federal judge with lifetime tenure. As Chairman Peter Rodino remarked when the Committee on the Judiciary of the House was considering the 17 Articles of Impeachment in this case:

> It is clear that the impeachment process is separate and distinct from the criminal law process. The fact of a prior acquittal on criminal charges does not prevent or limit the Congress from invoking the remedy of impeachment where appropriate."
>
> The American people look to us to protect them from persons holding public office who are unfit to serve by virtue of serious misconduct, constituting a violation of the public trust.

In 1986, the Senate decided, in the proceedings on the impeachment of Judge Harry Claiborne, that it could not delegate to the courts its constitutional function of preserving the integrity of our

judicial system. Therefore, in that case, the Senate voted that the respondent's criminal conviction was not in itself a basis for removal from office. Instead, the Senate had to create its own record and independently determine whether Judge Claiborne had engaged in misconduct which warranted removal.

In this regard, Senator Charles Mathias, the Chairman of the Committee that heard the evidence in the Claiborne case, stated, "We, not members of the Judicial Branch, will be the sole judges of the facts and the law which are germane to our constitutional responsibilities." The same is true in this case.

The jury verdict in a criminal proceeding—which I want to re-emphasize we believe was obtained through the use of perjured testimony and fabricated physical evidence—that acquittal has no role in deciding the procedures that should be adopted by the Senate and it is irrelevant to the Senate's determination of whether Judge Hastings should be removed from office.

For further comments regarding this matter, I would refer, at this time, to Congressman George Gekas.

The CHAIRMAN. Congressman.

Mr. GEKAS. Thank you, Mr. Chairman and members of the Committee.

It has been amply described that, of course, the final choice as to the procedure to be followed will be in your hands, and whether or not the full Senate will hear the trial or a committee is a matter of the utmost importance. We are constrained to re-emphasize to this Committee that if indeed you should choose the full Senate as the arena for this trial, it should not be on the basis of the assertion by Judge Hastings that this is a criminal proceeding and therefore demands the full jury, as it were, to hear the case.

We are convinced by precedent and by all that we have learned and by the nature of these proceedings that it is not a criminal proceeding and I trust that in your briefings, you will have sufficient memoranda and precedent before you to convince you that that is the case.

Judge Hastings will assert and reassert that the punishment—removal from office—is tantamount to a criminal punishment. Well, we know that it is not by all that is before us. He asserts that the fact that the Senate might include as a punishment barring him forever from serving in any high office is criminal in nature and therefore is a criminal proceeding.

We ask the Senate Rules Committee to reject that concept as the basis if it should decide the basis for having the trial in front of the full Senate. It is not a criminal proceeding, we re-establish to you. It is one in which the Congress of the United States has been asked by the Judge's peers—the Judicial Branch of the Government—to look into the possibility of removal from office of one of its own members and that is the key feature.

We submit that whichever way you go, by committee or by full Senate, that it should not be on the basis that it is a "criminal proceeding", according to Judge Hastings.

I thank the Senate.

Mr. BRYANT. Congressman Edwards.

Mr. EDWARDS. Mr. Chairman, I agree and support all of the statements made by my colleagues.

Mr. BRYANT. Mr. Chairman, if I might make one concluding observation. In the statement to be presented to you today by Judge Hastings, he pursues a strategy which became quite familiar to us in the course of hearing this matter before the Subcommittee on Criminal Justice. That is to say, we feel that he has clearly mischaracterized what our role has been in this matter so far.

He states, at one point, that the Managers—that is, the House Managers—have submitted a last-minute proposal to this Committee to further dilute the protections traditionally afforded the accused in the trial of an impeachment.

Mr. Chairman, this Committee directed us to attempt to find a means whereby we could abbreviate, in whatever way we could, the presentation of evidence before this Committee. And so, we have submitted a procedure for stipulating evidence which we think is fair. We did that in response to this Committee's direction and for no other reason and it is a fair and, I think, a very efficient proposal.

Second, he states in his statement that the Managers—that is, the House Managers—have maintained throughout that the House holds monopoly power over the evidence they receive from other branches, as well as that gathered by staff. We have, from the very beginning, made available to Mr. Hastings and his counsel, any document to be introduced at the trial of this case before the Senate; any witness statements which they might wish to use to examine the veracity and consistency of testimony of a witness which we may present to the Senate; and also, any exculpatory evidence which may have come within our possession.

The fact of the matter is, they already have all of that evidence, all of that material, and we have been very forthcoming. I think it is important to make that clear before concluding.

Finally, I would like to introduce to the Committee our Committee counsel who has led this investigation since 1987, Alan Baron, who is a prominent Washington attorney familiar to many of you already, I believe. We appreciate your time.

The CHAIRMAN. Alan, do you want to make a statement?

Mr. BARON. No, sir, unless it becomes necessary.

The CHAIRMAN. Fine. Does that conclude your presentation, Mr. Bryant? That's fine. I have just one question and then I will turn it over to my colleagues.

Throughout your testimony this morning, you suggest that all the evidence should be presented to either an impeachment committee or to the full Senate. From your suggestion, I take it that one witness is not necessarily more important than another one.

If the Rules Committee recommends that this impeachment should be tried before the full Senate, are you able to reduce the number of your witnesses or limit the time each witness will take so that the trial would be more manageable?

Mr. BRYANT. Mr. Chairman, I believe that I can answer that in the affirmative. We spent seven full days before the House Criminal Justice Subcommittee in considering this matter. However, I should emphasize that a significant reduction in time was achieved through the use of summarized testimony from Counsel Doar, which probably we could not accomplish in the trial of the case.

Our estimation has been that it would be about 15 trial days to put on the testimony.

The CHAIRMAN. Fifteen trial days?

Mr. BRYANT. That is right.

The CHAIRMAN. Consisting of eight hours per day?

Mr. BRYANT. Full days.

The CHAIRMAN. Full days?

Mr. BRYANT. That is right.

The CHAIRMAN. The Chair recognizes the distinguished Congressman, Congressman Brooks, who is here. Do you have anything, Jack, that you would like to say?

Mr. BROOKS. One comment, and thank you very much, Mr. Chairman, for your gracious recognition. I state to all of you that I appreciate the seriousness and the difficulty of establishing an absolutely fair procedure for handling this matter, and appreciate your own understanding of it.

We, on our side, be we Republicans or Democrats, have appointed Mr. Bryant to be our lead counsel, managing counsel on this for all of us, and we appreciate your understanding of that. I hope we can be helpful to you in our suggestions. We studied it hard and it was difficult. It was not my Subcommittee, but John Conyers' Subcommittee. Bryant was on it; Gekas was on it. Fish and I tried to keep them from doing anything wrong and they apparently did not.

The CHAIRMAN. With your ego and Hamilton Fish's ego, I am sure that everything went correctly. [Laughter.] Thank you, Jack. I have no further questions. Senator Stevens.

Senator STEVENS. Mr. Chairman, I first want to commend the Members of the House for the very professional way this matter has been presented to us and for the careful way in which the alternatives available to the Senate have been delineated. This matter has been extremely well-prepared.

Let me ask you some questions. Judge Hastings' counsel has told the Committee that he was going to file several pretrial motions. I believe it was three motions. Could you tell us, to your knowledge, have they been filed? Counsel, do you know?

Mr. BRYANT. Let me refer to our counsel for that answer, Mr. Chairman.

Mr. BARON. Senator, they have not been filed, to our knowledge. If they were delivered this morning, I have not been into my office yet, but as of late last night, they were not filed.

Senator STEVENS. Do you have any indication as to the time in which they were to be filed?

Mr. BARON. We had the same indication that you referred to at the beginning of your remarks, that they would be filed in advance of this hearing. We did not have, as far as I know, a specific date. They were supposed to have been filed, according to the directive contained in a letter to both parties, I believe, as of the 17th of this month. They were not filed on that date and that is the closest I can give you to what I understood to be an absolute deadline.

Senator STEVENS. While neither the House nor the Senate is responsible for the timing of the filing, my inquiry pertains to the amount of time that the House will need, if any, to respond to these pre-trial motions and whether or not we should delay con-

sulting with the Majority and Minority leaders of our body, to determine the timing for the initiation of action on this matter in the Senate.

Mr. BARON. Senator, in anticipation that such motions would have been filed as required by the directive to the parties as of the 17th, if you will look in the record, we filed a rather unusual document which anticipated what these motions would be, because we felt that you ought to have our side on these issues.

We felt that by reviewing Judge Hastings' responses to the original articles, we could pretty much figure out what issues he was likely to raise.

So we have already briefed, in anticipation of the issues we expected him to raise, virtually what we expect to be all of the issues, so that our ability to round out the briefing, once we have seen in fact what he files, the turnaround time should be very quick.

We do not need a lot of time, we have done the work, except that if he comes up with something that is totally new we might need a little more time. But we anticipate that we have a pretty good idea of what he is going to file, and in effect we have already begun answering it.

Senator STEVENS. Section 4 of Senate Resolution 480 indicates that counsel should report to the Senate on stipulations by February 20. Is that date still realistic?

Mr. BARON. Senator, the House filed voluminous proposed stipulations of fact, over 300 of them, which we felt should not be in dispute.

We also filed—I suppose it must run close to 50 pages—a list of documents, whose authenticity we felt should not be in dispute. Trial transcripts, telephone bills, things that we ought to be able to stipulate in advance and get out of the way.

I had not received any response from counsel for Judge Hastings until yesterday. We met. We have been advised, first, that Judge Hastings' counsel refuses to stipulate to any factual material, and, second, he has indicated that he will be willing, on a limited basis—it is not clear at this time just what, how far he is willing to go, we have not gotten into the details—to stipulate to the authenticity of at least some of the documents.

We have set at his request—I believe he said beginning February 11th—he said he wants to begin the process of reviewing the documents that we are referring to in the stipulation. I still think the date can be accomplished. That is where that stands at this moment.

Senator STEVENS. Thank you very much. Mr. Chairman, I do not have any further questions. I may have some questions about the procedure later because I don't see how the Senate could be expected to proceed without any stipulations as to facts, and I am exploring the question of whether we might utilize a procedure similar to that of a "master" before the Supreme Court, to make a determination as to these basic facts, and report that to us. Counsel.

Mr. BARON. We anticipated the possible difficulty. After all, stipulations take both sides to agree. We anticipated the possible difficulty of not being able to reach agreement. Accordingly, I believe Congressman Fish alluded to a proposal that we have made which

is analogous to, I believe, Rule 36 of the Federal Rules of Civil Procedure.

In essence, what that provides is, when a party calls upon the other side to admit certain facts, or to admit to the authenticity of documents, a burden is placed on the other side to either admit it, or if you are going to deny that fact, or deny the authenticity of that document, it is not enough just to say, "I deny it."

You must establish a valid grounds for that denial. Otherwise, it is taken as admitted. So it does not require agreement. It requires a bona-fide showing on the other side as to why they will not agree.

We have proposed that you adopt a rule along those lines, so that a refusal to stipulate is not going to end the matter.

You will have to establish why you are not agreeing, or else the matter will be taken as admitted, and I believe that that will go a long way toward precluding either side from hobbling the process by simply being recalcitrant.

And that would work both ways. If Judge Hastings has stipulations that he wishes to submit to the House, of course we will be placed under the same burden.

Senator STEVENS. Senator Helms has inquired whether that procedure was used in the Claiborne case. My counsel advised me it was not because of the fact that the stipulations were forthcoming.

Mr. BARON. Correct.

Senator STEVENS. My question to you is, if they are not forthcoming, how do we establish that the Senate will not be subject to the same type of procedural delays that went on in the District Court?

Can we provide that if a stipulation as to a fact is denied, that the statement of denial must be under oath?

Mr. BARON. It could be under oath. In a courtroom setting both counsel would be officers of the court. I see us in an analogous situation as officers of the Senate, since we are appearing before you as counsel, officers in that very limited sense.

I think that we have an obligation only to present papers that are presented in good faith.

Senator STEVENS. Well, counsel, if I were appearing before a court and made a statement that was false, I could be disbarred. If counsel appears before the Senate and makes a statement that is false, what are we supposed to do with him?

Mr. BARON. You may have other powers but not that one.

Senator STEVENS. We must implement a procedure that would provide that we would be able to get that person before the court. In my opinion this means that any assertion before the Senate must be under oath by counsel.

Maybe we should proceed with the understanding that we will put counsel under oath, including yourself.

Mr. BARON. I would be prepared to live with that.

Senator STEVENS. Thank you.

The CHAIRMAN. Senator Pell, do you have any questions?

Senator PELL. No questions at this time.

The CHAIRMAN. Senator Byrd.

Senator BYRD. I have no questions. I want to thank the managers on the part of the House for what is obviously a very thorough piece of work, and for a fine presentation before the committee, as well as before the Senate last fall.

The CHAIRMAN. Thank you, Senator Byrd. Senator Hatfield.

Senator HATFIELD. No questions.

The CHAIRMAN. Senator Inouye.

Senator INOUYE. No questions.

The CHAIRMAN. Senator Helms.

Senator HELMS. Just one, going back to the procedure.

Is it fair to assume that you recommend this to save time?

Mr. BARON. Absolutely.

Senator HELMS. How much time do you think it will save?

Mr. BARON. Enormous. Let me give you some examples. There are a great many documents. This case is made up of a lot of pieces—some large, but many small. That is one of the reasons why we urge that you not split up the presentation of the evidence.

A lot of it will not make sense unless you see the whole picture. If we go by the Rules of Evidence, and if you do not stipulate, for example, to the authenticity of telephone records, airline tickets—all that sort of stuff that in almost any context people would acknowledge their authenticity—then you have to bring in somebody to say this is a telephone record, and here is how we keep the records, and just waste enormous amounts of time for no good purpose.

In addition, there are a great many facts in this case which are undisputed, truly undisputed. We should not have to put on witnesses to establish what the parties really are not in a position to contest. That is what stipulations normally would be about, or what requests for admission would be about, and I think it would save an enormous amount of time.

Senator HELMS. Well, I want to be sure I understand it.

I have a few virtues. One of them is that I am not a lawyer. Now, explain to me, if you will, sir, in just layman's language, how this procedure would work.

Mr. BARON. I take it you are referring to the stipulations and the requests for admission?

Senator HELMS. Yes.

Mr. BARON. We have filed stipulations. You have asked Judge Hastings to agree that these facts are true. You will sit ultimately as the triers of the facts to determine, really, disputed facts. But if a fact is not disputed, there is no reason you have to sit there in judgment on it.

So that if it is stipulated, it is simply made a part of the record and it is a given. You do not have to hear somebody say it.

Senator HELMS. Well, I must have missed something in translation. I was really trying to find out what happens if the other party objects. Then will the evidence be presented?

Mr. BRYANT. Senator, if we bring forward, for example, telephone records to show that a certain phone call was made at a certain time from one point to another point, these are documents obtained from the telephone company.

They are, in our view, indisputably accurate evidence.

Senator HELMS. Oh, I agree.

Mr. BRYANT. And we would submit them in the trial of this case to the Senate.

Senator HELMS. But suppose the other side objects to those telephone records?

Mr. BRYANT. Well, that is exactly what is in issue here. If they choose to object to the submission of that kind of hard evidence, then we will have to go through a much more lengthy procedure in which we will have to bring in people from the phone company, for example, to testify that, yes, indeed, this is the way in which we keep our records, this is in fact an accurate record of that particular day, and so forth. And then he will be cross-examined.

That is a very lengthy procedure.

Senator GORE. Would the Senator yield.

Senator HELMS. Sure.

Senator GORE. But you suggested an alternative to that whereby we could take some version of the Federal Rules of Civil Procedure and choose to accept the validity of that evidence absent a compelling showing by counsel for the respondent that there was some reasonable basis for challenging the authenticity of the evidence in question.

Is that what you recommend?

Mr. BARON. That is absolutely accurate, and in line perhaps as a means of putting pressure, if you will, or some sort of hold on counsel as to veracity, Senator Stevens suggested that everyone be put under oath in terms of their representations in that regard.

But that is precisely what we are proposing.

The CHAIRMAN. Senator Helms, are you through?

Senator HELMS. Yes.

The CHAIRMAN. Senator DeConcini.

Senator DECONCINI. Mr. Chairman, thank you. Let me ask counsel if this were a criminal case, and the telephone records were presented, the burden of proof would lie on the prosecutor to substantiate proper foundation that those records were what they were. Right?

Mr. BARON. That is true.

Senator DECONCINI. So, Mr. Chairman, it seems to me that the Senate can adopt any rule it wants to, but though this is not a criminal procedure, I would not want to rule out asking the House to substantiate it, and having a committee that would take the time to be sure that those facts are true.

Now records from a telephone company are not going to be that difficult to substantiate, perhaps, but I am not sure that we want to put the burden on the respondent here, or the counsel for Judge Hastings to have to come forward and dispute that because these are serious allegations.

And though we are not bound by criminal rules, to me, this is a serious matter, as if it were a criminal case.

The CHAIRMAN. Senator Gore.

Senator GORE. Well, first, Mr. Chairman, I want to add my commendation to those already expressed to the members of this delegation from the House, and particularly to Congressman Bryant who is serving as lead counsel, and to Congressman Conyers in whose subcommittee this matter originated.

I have had the privilege, Mr. Chairman, of serving with each one of these members of the other body, and I know and respect greatly each one of them, and appreciate not only the professional job they have done, but also the burden that comes with sitting in judgment even for purposes of voting impeachment on a fellow human being.

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It is a very difficult task, and, having been a member of the committee in the Senate which heard the evidence against Judge Claiborne, I know that it is a thankless as well as difficult personal task.

I have one question for Congressman Fish. You made a statement about the choice between hearing evidence before a committee established under Senate Impeachment Rule 11, or hearing evidence before the full Senate, and you recommended that whichever choice is made, all of the evidence should be considered in that forum, and a summary thereof should not be—if it is presented to a committee, then you would be opposed to presenting a summary of the evidence to the full Senate? I did not quite understand that.

Mr. FISH. If the gentleman would yield. I do not think I made any recommendation other than there be no bifurcation of the evidence as presented to——

Senator GORE. What do you mean by that?

Mr. FISH. Well, part of it presented to the committee, and a different part presented to the Senate.

Senator GORE. I see.

Mr. FISH. Certainly, in the Claiborne case, after we had several days of the Rule 11 committee, Chairman Rodino and I did summarize, in the space of a little less than two hours before the full Senate, what we thought were the facts that substantiated the——

Senator GORE. So you have no objection to a summary being presented to the full Senate after a Rule 11 committee hears——

Mr. FISH. I would expect Members of the Senate, if there was a Rule 11 committee, would expect a committee report.

Senator GORE. I would think so, and I think that it did work to protect the respondent's rights in the Claiborne case, and also to allow the Senate to proceed as it does with virtually every other matter that comes before the Senate in empaneling a subgroup of Senators to delve into great detail, and then for the body to trust their judgment, and to retain the right to explore themselves any detail which they wish to inquire about further. That is all that I have, Mr. Chairman.

The CHAIRMAN. I might notify the audience that there is a huge crowd outside, and they want to get in. There is not, of course, enough room for all, and it has been our procedure to rotate among spectators. We ask that when we finish the Senators' questions, those here who are not associated with the judge, or the House, leave, so the crowd outside may come in and at least have an opportunity to listen.

Senator Moynihan.

Senator MOYNIHAN. No comments, Mr. Chairman. I would like to thank our distinguished guests.

The CHAIRMAN. Thank you. Senator Dodd.

Senator DODD. Thank you, Mr. Chairman. Just very briefly. First of all, I want to join in welcoming my former colleagues in the House. Mr. Chairman, I had the pleasure of serving on the House Judiciary Committee and served with five out of the six members here, and George Gekas is a good friend as well, so I am delighted to welcome them to our Rules Committee.

I just have one question which I wanted to satisfy myself on.

Senator Helms said, regarding the stipulation question, and the use of Rule 36, is it?

Mr. BARON. Rule 36 is the one that deals with requests for admissions.

Senator DODD. Just so I understand this. Senator Helms said the reason for this is time. You can say to this committee, all of you can without any hesitation whatsoever, time is a factor and certainly an important one, but I do not think any one of us in any way wants to sacrifice the exercise of justice over time.

But are you satisfied that there is no negative implication here, there is nothing that we should be concerned about, that in fact the rights of Judge Hastings would be protected completely by the procedure you are suggesting?

I mean, in fact, you know, telephone records can be wrong.

Mr. BRYANT. Senator, if I might interject here. At no time in the entire 6-year history of this matter have they ever alleged that those records were wrong, and alleging it at this stage in order to delay this proceeding we would submit is not reasonable.

Senator HELMS. Would you use a microphone. I want to hear this, too. And Chris, you raised the question that was also on my mind; that is, what is time worth?

Senator DODD. Right. Exactly. I was sort of agreeing with where you are coming from.

Senator HELMS. Okay. Would you repeat what you said, sir.

Mr. BRYANT. If, indeed, the respondent believes that any evidence we are submitting is subject to impeachment, that is, subject to being criticized for not being accurate, then certainly the Senate ought to employ the most just procedure possible to follow up on that allegation.

But when we are submitting to the Senate hard evidence that has been utilized before the Judicial Investigating Committee of the 11th Circuit, before the Judicial Council of the 11th District, before the Judicial Conference of the United States, before the Criminal Justice Subcommittee, the Judiciary Committee in the House, and at no time have they ever alleged that the evidence was not valid——

Senator HELMS. Okay.

Mr. BRYANT [continuing]. Then to allege that at this stage of the proceeding, it seems to us, would be absolutely needless. But you will have to be the judge of that.

Senator STEVENS. Will the Senator yield to me?

Senator DODD. Certainly.

Senator STEVENS. In my judgment, we have to be careful of precedent. The Supreme Court has matters of original jurisdiction. They do not use the rules that pertain to trials before a District Court when they entertain original jurisdiction cases.

We have constitutional functions to perform here. Treaties, confirmation, and other things to do. We cannot turn the Senate into a trial court on anybody's assertion. We have to find a way to handle this fairly—I agree with that—but we cannot be forced by counsel into becoming a District Court of the United States in a criminal trial setting.

Now I would urge you to keep that in mind.

Senator DODD. Well, I am not suggesting otherwise. I just wanted to get a clarification. I am concerned about time as well. I think we all obviously want to see justice done. I appreciate that response and I presume there are some matters that are in dispute with regard to certain information, and certainly, in those matters, that I presume, whether it was the full Senate or a committee, would hear evidence regarding.

Mr. FISH. Well, in those cases, Senator, there would not be a stipulation with respect to those documents, and I think that our acceptance of the suggestion, Senator, that counsel be under oath in these matters will underscore that.

Of course the question of time is important, but the other side of the coin of time is dilatory tactics.

Senator DODD. I totally agree with that and I appreciate that.

The CHAIRMAN. Senator Adams.

Senator ADAMS. I would just follow up on that point by saying that I hope we do not get into a situation where we spend more time trying to force through Federal Rule 36 than we would by simply having the telephone person come in and testify.

That is a judgment that I hope the Chair will reserve, that we could go either way, though I happen to think the suggestion is a good one. But if we get into that kind of a wrangle, that we have some flexibility.

I just have one question. I want to welcome my former colleagues of the House. I, too, have served with most of them and I think the presentation was excellent.

I am concerned about the fact that I am informed by staff, and others, that Judge Hastings has asked the Senate to order discovery, that there has not been—in other words, that there be depositions and statements, and interviews.

In other words, that he has not received a full statement of the evidence. That is a very dangerous proposition for us to deal with.

This seems almost impossible to me, and Congressman Bryant, you stated right at the beginning, that you have given to the judge in this case all of the materials, exculpatory or otherwise, and I just do not know, and want to know whether or not this committee is going to be subjected to a charge that some files were not presented, and therefore he does not have a full defense.

We can be no judges of that but that could take a lot of time, if you get into that kind of an argument.

Would you tell me, is there something that he has a demand for that has not been given to him, and that we would have to make a decision on.

Mr. BRYANT. Well, Senator, first of all, he has asked for virtually every document that the House reviewed in its investigation.

That is an impossible request, never granted in a Federal criminal trial, and this is not a Federal criminal trial. This is a different animal altogether.

There is no precedent for discovery at all in an impeachment trial, and he fails to mention that the House provided him with a copy of its 14-volume Statement of Information, which contains virtually all documentary evidence relied upon by the House with respect to Articles I through XV, and Article XVII.

He has also received from the House copies of the 2,800 exhibits gathered by the 11th Circuit Committee that investigated the bribery and perjury charges; a copy of the transcript of the testimony of the 100 witnesses heard by that committee; a copy of the transcripts of and the exhibits to his criminal trial, and the separate trial of William Borders, and much more. I do not think that it would serve your purposes for me to continue reading.

Senator ADAMS. Thank you, Mr. Bryant. I do not want to pursue it any further. I just do not want to have us faced with the fact that there has been a surprise, and that from your statement it would appear to me the number of hearings and the number of proceedings, that if there is a surprise at this point, that it would be a real surprise.

Mr. FISH. Senator, it is safe to say that more information has been supplied to the judge than would have been the case if this had been a criminal matter.

The CHAIRMAN. Let me make a point here. I have a fortunate or unfortunate position, not being a lawyer. It is an advantage in some places, and a disadvantage in others.

The questions here, as I understand them, are assuming that you held a trial. You have not held a trial, you have investigated. We are the ones who are going to hold the trial. So I think we have to be very careful about the assumption made here, that you held a trial. You just gathered evidence, and are making a recommendation, citing points related to the prospect of an impeachment, Mr. Bryant.

Mr. BRYANT. Mr. Chairman, Chairman Conyers can answer this better than I, but we did not hold a trial. No.

The CHAIRMAN. I do not want to get that assumption into the questions.

Mr. BRYANT. I just want to emphasize, though, that the procedure followed by Chairman Conyers was exhaustive in its completeness, and extremely open, far beyond what is required of us in terms of the opportunities given to the respondent to respond to us, to participate and submit what he wanted to submit.

The CHAIRMAN. You know, the extent by which you, I think Congressman Conyers said, "bent the rules," may have set some precedents here that bother me in trying to prepare a very fair and legitimate procedure to recommend to the Senate. We have to do that in a very few days under the resolution that was passed by the Senate.

I want to be very careful that what we do is fair. I tried to put myself in the position of the judge, and also in your position. At some point we will make a judgment as to what we recommend, and that will be a judgment on procedure and not a judgment on Judge Hastings.

Mr. BARON. Mr. Chairman, if I may add, since I have been sort of in the trenches on the issue of document turnovers. It may be a little bit helpful to give you a little bit of detail.

First of all, Judge Hastings has received, over the years, enormous—I am talking thousands of documents, thousands upon thousands of documents. He received discovery in the course of his criminal trial pursuant to the criminal rules.

He had access to a 4,000-page transcript, and 2,800 exhibits that were amassed by the Judicial Investigating Committee.

After these materials were referred over to the House, he was given copies of those exhibits as well as his own copy of that 4,000-page transcript, and any other materials that we introduced in the course of the hearings before the subcommittee.

In addition to that, he was given by the 11th Circuit Investigating Committee that investigated the allegation that he had wrongfully leaked information that he had received in confidence as the supervising judge of a wiretap, he received their record, a volume of 500, 600, 700 pages, from the chief judge of that circuit.

A tremendous amount of material has been turned over. So let's start with that. In addition to that, he has filed—the pagination is not serial so I cannot give you the exact number of pages, but it is about half an inch thick—in effect asking for any document, any memoranda, anything that the House has ever looked at, at all, in the course of its entire investigation.

Now we have responded to that. I think the actual filing will take place today.

But I will tell you now, what position the House has taken. We have agreed that we will turn over to him a copy of any document that we propose to put into evidence. A copy of any document we propose to put into evidence he would receive in advance, so there would be no surprises.

Second, we would give him copies of any statement of a witness who is called to testify, so that for purposes of cross-examining that witness for impeachment purposes, to test his veracity, he would get that.

He has received much of that. There are a few he has not yet received.

And finally, if there is any evidence which would tend to exculpate him, that, indeed, suggests that he did not commit the wrongs that are alleged in the article, we would turn that material over to him.

Where we have drawn the line is, and we have said that we do not believe, that under any system of discovery, even if he were on trial for his liberty for the next—you know—for 20 years, would he be entitled in effect to have wholesale access to everything we ever looked at in the course of an investigation, and we have resisted that.

But we believe that what we have proposed, first of all, is eminently fair, second of all, that he has received about 99 percent of it. What remains to be turned over is perhaps a stack of documents a couple of inches thick, and we do not want to see the issue of discovery become a matter for delay in these proceedings.

The CHAIRMAN. Senator Moynihan.

Senator MOYNIHAN. Mr. Chairman, just for purposes of clarification, I believe it was Mr. Bryant who used the phrase, "bent the rules," and would I be correct——

Mr. CONYERS. It was me.

Senator MOYNIHAN. Or it was Mr. Conyers, Mr. Chairman. Sorry, sir. Would I be correct in saying that was used in the sense of "went the extra mile," and was not being, you know, typed and doing only the minimum necessary.

Mr. CONYERS. I was hoping that everyone would understand that phrase, but I am glad that you raised it, Senator Moynihan.

What I meant, of course, was that we gave him every concession, every consideration——

Senator MOYNIHAN. You went the extra mile, and——

Mr. CONYERS [continuing]. Every request that we could possibly conceive was rational. He made an opening statement with an assurance that it would not be cross-examined. I know that that has never happened anywhere before.

And all of the counsel's requests were considered in a light most favorable to them at all times, and that has been the style of this Subcommittee on Criminal Justice from the very beginning of this proceeding.

Senator MOYNIHAN. I thank you, sir, for being more specific.

The CHAIRMAN. I think we have to be very careful. In this Senator's opinion, we are beginning to look at questions here, and the suggestions of both sides, that should be left to others. An impeachment committee or the full Senate should make the kind of judgments that we are making here, or at least we are beginning to argue here.

I think we ought to bring it to a halt and not get too far afield. We do not want to be into what the committee, or the full Senate, as we decide here to recommend, might do.

I have no further questions. We still have a quorum here and we want to get to Judge Hastings. I ask those in the room to help your colleagues outside that want to come in and see this. You have been in here well over an hour now, and they have been waiting out there for over an hour. While we are moving from the House members to Judge Hastings, would you all help us so the others outside in the hall can come in without us having to close down the meeting until everybody goes out and we let the others in. Please cooperate with the Chair.

I thank the House members for your testimony here today.

[The prepared statement of the House Managers follows:]

STATEMENT OF THE MANAGERS ON BEHALF
OF THE HOUSE OF REPRESENTATIVES

I.

On behalf of the House of Representatives, we would like to thank the Senate Committee on Rules and Administration for the opportunity of presenting our views as to what procedures the Senate may want to employ in the impeachment trial of Judge Alcee L. Hastings. The House recognizes that it is within the Senate's sole discretion to establish the governing procedures. The suggestions we make here today are just that — suggestions — of procedures the Senate may want to consider in order to ensure a fair and timely resolution of the pending case.

As we have made clear in our written submissions to the Committee, the House of Representatives suggests that the Senate adopt a two stage process. The first stage would be a pre-trial proceeding, during which any motion that seeks to dispose of one or more of the Articles of Impeachment would be briefed and argued by the parties, and subsequently resolved by the Senate. We believe that the full Senate would have to decide any dispositive motions; however, either the full Senate or a committee could oversee the briefing schedule and conduct a hearing during which the arguments of the parties would be presented. If the Senate chooses to use a committee during this part of the impeachment proceeding, it could also ask the committee to make a recommendation on the motions.

The second stage of the pending impeachment would be the presentation of evidence. During the second stage, pre-trial matters of more limited scope would be resolved, the trial would be conducted and all evidentiary motions would be briefed, argued and decided. The House of Representatives takes no position with respect to whether the trial should be conducted before the full Senate or a Committee appointed to Rule XI of the Senate Impeachment Rules. We are prepared to present our case before whichever body the Senate chooses to hear the evidence. If, however, the Senate appoints a Committee pursuant to Rule XI, we suggest that it be explicitly authorized to resolve all evidentiary matters.

Our major concern with respect to the second stage of the pending impeachment is that the trial be conducted before a single body. In other words, the House urges this Committee to recommend to the Senate that <u>all</u> the evidence should be presented to either the full Senate <u>or</u> to a Rule XI Committee, but not to a combination of the two. We feel this is an important procedure to adopt because bifurcating the presentation of the evidence runs a significant risk that more weight will be given to the evidence presented to the full Senate than to that presented to the Committee. In addition, there is the risk that evidence may be taken out of context and different evidentiary standards may be applied. In order to avoid these results and to ensure that the impeachment trial is fair to both parties, the House of Representatives asks this Committee to recommend a procedure whereby all the evidence would be presented to a single body.

Finally, the House suggests two additional procedures which we believe would contribute to the expeditious resolution of the trial. First, we ask the Committee to recommend to the Senate a rule establishing that any proposed stipulation of fact filed with the Senate by one of the parties to this proceeding will be accepted as true unless the opposing party files a written objection, including a proffer as to why the proposed stipulation of fact should not be taken as true. Such a rule would eliminate the need for testimony concerning facts that are not seriously in dispute.

Second, the House suggests a similar procedure with respect to the many documents that are part of this case. We suggest the adoption of a rule whereby any stipulation as to the admissibility of a document, which is filed with the Senate by one of the parties to this proceeding, be accepted as true unless the opposing party files a written objection, including a proffer as to why the proposed stipulation should not be taken as true.

We believe that both of these procedures, along with the others we have mentioned, will help ensure a timely and just resolution of the pending impeachment proceeding.

II.

On behalf of the House of Representatives, we would like to emphasize that the House does not take a position on the issue of whether Judge Hastings' trial should proceed before the full Senate or before a Committee appointed pursuant to Rule XI of the Senate Impeachment Rules. The House recognizes the Senate's authority to choose either alternative and there is ample precedent for both: early impeachment trials were conducted before the full Senate; more recently, in 1986, a Committee was appointed pursuant to Rule XI in the impeachment of Judge Harry Claiborne. The House is prepared to bring its case before whichever body the Senate chooses to hear the evidence.

In his written submissions to this Committee, Judge Hastings has argued extensively that the full Senate should hear the evidence because the procedures employed by the House of Representatives in its impeachment proceeding were unfair to the accused and did not adhere to constitutional principle.

As the Managers for the House of Representatives, we must take issue with Judge Hastings' characterization of our proceedings. We would be lax in our duties if we did not defend the House of Representatives against such a charge.

There is absolutely no basis for the contention that the procedures employed by the House require this case to be tried before the full Senate, for the House conducted its investigation in a manner that was fundamentally fair, consistent with precedent and, most importantly, protective of the rights of the accused.

What the respondent fails to recognize is that our role was a limited one. Pursuant to Article I, Section 2 of the Constitution, the House of Representatives was to conduct a factual investigation to determine whether Articles of Impeachment should be brought. We engaged in the first stage of the constitutional process. We were not to conduct a trial, for that is the Senate's exclusive constitutional function. We discharged our duty with fairness and from a position of neutrality.

Like any other type of investigation, the House investigation into the facts of this case did not employ trial procedures. To use such procedures would have been inappropriate. The Subcommittee on Criminal Justice, however, wanted to make sure that Judge Hastings' views were presented. For this reason, we allowed him and his counsel to participate fully in our hearings, including the questioning and calling of witnesses. Judge Hastings addressed the Subcommittee and we gave him the opportunity to develop additional information for our review. Our investigation proceeded in a manner consistent with precedent and with a concern for fundamental fairness.

The House of Representatives' investigation led to the conclusion that Judge Hastings should be impeached. The evidence establishes that his conduct warrants removal from office. The Managers, therefore, are ready to bring before the Senate the case against Judge Hastings. We will present the evidence before the full Senate or a Committee appointed pursuant to Rule XI of the Senate Impeachment Rules, whichever body the Senate chooses.

III.

In this impeachment proceeding, the Senate must determine whether Judge Hastings has committed the acts alleged and whether those acts constitute high crimes and misdemeanors warranting removal from office.

In his submissions to this Committee, Judge Hastings emphasizes his acquittal by a criminal jury on the allegation that he participated in a conspiracy to accept a bribe. He argues that this jury verdict requires the Senate to proceed with an impeachment trial before the full body.

It is the position of the House of Representatives, however, that the acquittal should play no part in these proceedings. In both a legal and constitutional sense, the jury verdict is irrelevant to your decision regarding what procedures to recommend and to your ultimate decision whether to convict Judge Hastings on any of the Articles of Impeachment.

The trial that the Senate will conduct in this case is neither dependent upon nor related to the criminal trial. Many of the Articles presented by the House of Representatives contain charges that were never decided by the jury. More importantly, the Constitution itself establishes, in Article I, section 2, clause 7, that the impeachment trial is independent of the criminal case. Finally, the Senate's impeachment trial and the criminal prosecution serve two very different and important functions. The primary goal of a criminal proceeding is personal punishment. The impeachment process, in contrast, is remedial in nature. It serves the entirely different purpose of having the Legislative Branch determine whether the conduct of a public officer, in this case a Federal judge, has betrayed the trust of the American people and has compromised the public's trust in our Government. Unlike any criminal proceeding, the Senate impeachment trial will ensure the integrity of the Federal judiciary.

As Chairman Peter W. Rodino, Jr. remarked when the Committee on the Judiciary of the House of Representatives was considering the seventeen Articles of Impeachment in this case:

> It is clear that the impeachment process is separate and distinct from the criminal law process. The fact of a prior acquittal on criminal charges does not prevent or limit the Congress from invoking the remedy of impeachment where appropriate....The American people look to us to protect them from persons holding pubic office who are unfit to serve by virtue of serious misconduct constituting a violation of the public trust.

In 1986, the Senate decided in the proceedings on the impeachment of Judge Harry Claiborne in 1986 that it could not delegate to the courts its constitutional function of preserving the integrity of our judicial system. Thus, in the Claiborne case, the Senate voted that the respondent's criminal conviction was not, in itself, a basis for removal from office. Rather, the Senate had to create its own record and independently determine whether Judge Claiborne had engaged in misconduct which warranted removal from office.

In this regard, Senator Charles Mathias, the Chairman of the Committee that heard the evidence in the Claiborne case, stated "We, not members of the judicial branch, will be the sole judges of the facts and the law which are germane to our constitutional responsibilities."

The same is true in this case. The jury verdict in a criminal proceeding has no role in deciding the procedures that should be adopted by the Senate and is irrelevant to the Senate's determination of whether Judge Hastings should be removed from office.

The CHAIRMAN. Judge Hastings, will you and your colleagues that will be presenting your proposal and recommendations this morning take your seats.

Mr. ANDERSON. Mr. Chairman, Judge Hastings is briefly out of the room.

The CHAIRMAN. Oh. Fine. If you assemble up there, he and you, and who else, will be at the head table? As I understand it, you, Patricia Graham, and the judge will be the three who speak.

Mr. ANDERSON. Myself, the judge, Patricia Graham, and Ann Richardson, our co-counsel, will operate the equipment.

The CHAIRMAN. Fine. We are waiting for the judge now. We do not want any grand entrance. We would like to get on with the hearing this morning.

Mr. ANDERSON. I understand. I think he went down the hall.

The CHAIRMAN. I appreciate it.

Mr. ANDERSON. I suppose, as a lawyer, I am more accustomed to waiting on judges than you are.

The CHAIRMAN. Since I am not a lawyer, there are a lot of things I am not used to.

Mr. ANDERSON. It has been a learning experience for me, sir, for the past seven years.

The CHAIRMAN. Well, welcome to a large and growing crowd. May I compliment the audience this morning. Even though it has been very crowded in here, you have been quiet, and have been polite. We want you to know that the people up here appreciate that. It speaks very well for those who are attending the hearing this morning.

We are now ready to proceed. Who shall speak, the judge or the professor?

STATEMENT OF A PANEL CONSISTING OF TERENCE J. ANDERSON, PROFESSOR, SCHOOL OF LAW, UNIVERSITY OF MIAMI, CORAL GABLES, FL; PATRICIA GRAHAM WILLIAMS, ESQUIRE, MIAMI, FL; AND HON. ALCEE L. HASTINGS, U.S. DISTRICT JUDGE, U.S. DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

Mr. ANDERSON. Mr. Chairman, I will initially speak. Patricia Graham Williams, who was Judge Hastings' trial counsel back in 1983 will be available for members' questions, and Judge Hastings of course will be available for members' questions, if you so wish.

Mr. Chairman, I do not appear before you as a former colleague. My credentials do not come before you other than the fact I have been a lawyer for 25 years. I do not think I have ever made a misrepresentation. My reputation at the bar is that. I do not have that reputation before you because I do not serve in Congress.

We have moved into an adversary proceeding. I represent Judge Alcee L. Hastings. The managers represent the House of Representatives. You are judges; this is not a legislative process.

I have submitted to you that there are four propositions whose truths seem to me self-evident, self-evident based on a study reaching back to the 1400's in England, and reaching back to our own history.

First, the trial of this impeachment must be before the full Senate. There is no choice. A committee will not do.

Senator Mathias made the point, there are cases, perjury, where credibility is at issue. That is at issue here.

Second, the House through its managers must carry the burden of competently proving its accusations. The proposed stipulation process is unprecedented in cases of impeachment. It would not work in a criminal case and it will not do here.

Third, Judge Hastings must be given access to the evidence that has been withheld.

The prosecutors gave Judge Hastings such evidence that they thought was necessary at trial, and represented to the trial judge that William Dredge, the informant, was not material, and he need not be produced. William Dredge is the cornerstone of the allegations before you now, and we have never confronted that man, and I will not stipulate to his telephone records because they were under a pseudonym, and I have never seen them.

I have seen the records but I have never seen the pseudonym or the man.

Simply, Judge Hastings must be given that two inches, five inches, or however many inches have been withheld, and he must be given the subpoena power that has been denied him for the past six years to call forth evidence in his favor.

I would not expect the prosecutors to search it out. Fairness requires, at this point, in this case of impeachment, that funds and time be made available to the defendant.

This man—it did not begin six years ago; it began in October 1981. This man has borne burdens too heavy, too long, and that cannot continue if the trial of this impeachment is to be fair.

Mr. Chairman, the presentation this morning and the materials before you suggest that these propositions are not self-evident to my colleagues at the bar, those who have appeared on behalf of the House and before the Senate, but, in my view, I hope they become that to you because I think the central issue is clear.

Should the Senate, in this case of impeachment, sell its constitutional soul in an honorable tradition that extends 200 years, as well as the judge's rights, in exchange for those lovely words—efficiency and political expediency?

For 150 years the Senate knew how to try an impeachment right. It did it. Senators grumbled some rinky-dink district judge is interfering with the business of the Senate.

They cavilled but they did it. They knew it. And the reason they knew it is that all have understood cases of impeachment are criminal cases.

There are cases in which the House prosecutes a citizen who has been entrusted with an office of high honor by the United States. The House alleges and must prove that the accused official committed treason, bribery, or other high crimes and misdemeanors.

The Senate does not remove the officer. The Senate convicts or acquits. Removal is merely the automatic punishment that follows upon a judgment of conviction, and the Senate has power to punish further.

They have power to bar forever the accused from holding any office of honor, trust, or profit under the United States. That was

understood by the Framers as, and it must be understood now, as a punishment for a person who has held an office of high trust, more severe than the death penalty, and surely no Member of this honorable body can dispute that conclusion.

The Constitution entrusted the power to try cases of impeachment to the Senate precisely because they were the most serious types of criminal cases we could think of.

It is an awesome responsibility. Those cases are too serious, too important for the courts, but with that awesome power comes awesome responsibility.

The Senate must set aside the legislative business, and I know that is difficult, and conduct a trial. A trial that affords the House an opportunity to prove its accusations, but a trial that affords the accused the rights and protections afforded to all accused of committing high crimes and misdemeanors.

The Senate must set aside the legislative process also in this matter. That, I hear from you, you are reluctant to do, but on each of the Senate's Members is conferred a power that God conferred upon Solomon—the power to do judgment. On the day of judgment each Senator—and we are here to call upon your honor and your oath—must execute a special oath taken for this case of impeachment and must do impartial justice in judging whether the evidence has shown that this accused was guilty of the high crimes alleged.

My children, your children, our fellow citizens, you and I—we all know the essential characteristics of a criminal trial. The accuser must be afforded an adequate opportunity to present competent testimony and other evidence in support of its accusations.

This must be done in presence of the jurors. More important, the accused must be afforded the opportunity to confront the witnesses and other evidence, and this must be done in the presence of the jurors.

You must be allowed to confront and cross-examine the witnesses so that their demeanor and credibility may be observed by the jurors.

You must be allowed to object, so that improper testimony and evidence may be excluded, and never permitted to infect the jurors' minds. He must have the opportunity, when the prosecutors rest, to challenge the sufficiency of their evidence.

My children, your children, our fellow citizens, you and I—we all know that it is only after the accuser has met its initial burden that the accused must, for the first time come forward, and assume the burden of proceeding.

Then and only then may the accused be called upon to present evidence in support of his innocence. And when all the evidence is in from both sides, has been heard and seen by the jurors, there is a further step.

The accuser and the accused must be afforded a fair opportunity to review and comment upon that testimony still fresh in the jurors' minds. They must be permitted to engage the jurors and the evidence in order to persuade the jurors who will decide the case where truth lies, where justice may be found.

My children, your children, our fellow citizens, you and I—we all know that this must be done under the gaze of the public. The ac-

cused is entitled to a public trial. The public, not just the parties, are entitled to watch, in order to satisfy themselves that the jurors—each juror, not a committee of jurors—but every juror, has paid proper attention to all the testimony and other evidence.

Jurors and judges must be held accountable for having the job done right. How else can the Nation, or the parties have confidence in the outcome? And it is only after that has been done that you may retire from public scrutiny to deliberate.

The Senators here must assume Solomon's burden in this case of impeachment. They must exercise the power of judgment. They must execute the duties imposed upon them by the Constitution, by their oaths of office, and by that special oath that each of you took to do impartial justice in all things appertaining to the trial of this impeachment.

If there is to be a trial, a trial that is fair, the Senators, not their staffs, must pass judgment upon the testimony and evidence. Those who would pass judgment upon Alcee L. Hastings now must do, and must be seen to have done, what the jurors who passed judgment six years ago did and were seen to have done.

Mr. Chairman, the tape I brought bears directly on these points and may easily substitute for several thousand of my words. It is self-explanatory and I would ask that it be now shown.

The CHAIRMAN. Would you turn the light off back there? The spotlight is shining right in our eyes. We will never see what Judge Hastings wants us to see. Thank you very much, thank you.

[Videotape shown.]

Mr. ANDERSON. Mr. Chairman, members of the Committee, thank you for your attention on that, but let me submit that if there is going to be a trial, a trial that is fair, every Senator must do, and must be seen to have done, what Debi McMullen and her fellow jurors did.

If there is to be a trial of Alcee L. Hastings in the Senate, we ask that every Member of the Senate who would be present on the day of judgment also be present to hear the opening statements so the managers and counsel for the judge may preview and structure the evidence in public in order that the jurors, the Senators, may understand, as Debi McMullen and her fellows understood, the evidence and evaluate it as it is presented; to hear and see the witnesses as they testify; to hear and see all the witnesses; to observe them when they are confronted; to observe them to evaluate the quality of their recollection, the conviction with which they are held, and the sincerity with which they are expressed; to see and hear the other evidence in the context in which it is presented and through the witnesses who have presented it.

A stale printed record can only be a transcription of words that were said, but not heard. The exhibits can be neatly bound, but they will be far separated from the testimony and the evidence in which they were presented. I submit that that will not do in this case; it will not do at all. If there is to be a trial, it must be a trial in the Senate, the full Senate, if that is to be a fair trial.

But, Mr. Chairman and members, I return to where I started. There are three additional points whose truth seems to me self-evident and they bear upon concerns that the members have raised in their discussions with the managers, so let me go to them briefly.

I take it the goal is to do a trial that will do, and be seen to have done, impartial justice to Judge Hastings. I think there are three points. First, the managers have submitted a last-minute and unprecedented proposal to dilute the protections traditionally accorded the accused in the trial of impeachments.

Their staff have prepared voluminous proposed stipulations based upon a statement of information that their staff prepared before the hearings. Mr. Chairman, much is made of the statement of information as though it mattered. We were excluded by the chairman of the committee and the chairman of the subcommittee from any participation in the preparation of that document.

There was no Bert Jenner, minority counsel for us, working with a John Doar to see that it was balanced. There was no minority party; there never is for a judge. That statement of information is the prosecutor's statement of information and we were excluded. That it contains the documents that the prosecutors think we should have, I do not doubt, but that is not what we are talking about.

Before we have had access to the evidence before a trial, they would like to shift the burden to the accused. Come forward, admit or deny, and if you deny, tell us why.

Mr. Chairman, the House had the opportunity, and if you look back at prior articles they have exercised it in the past, to formulate the accusation in their articles of impeachment in as much detail as they chose.

Judge Hastings has responded; the managers have replied. The facts in dispute are now framed. It is the managers who must recognize that they now have the duty to make good their accusations, for they are only accusations.

They must present competent testimony and other evidence and when they rest, and only when they rest, may Judge Hastings fairly be called upon to decide whether and what evidence he will present in support of his innocence. That is the burden the prosecutors assumed when they tried the case to Debi McMullen. That is the procedure that was followed. Debi McMullen and her eleven other jurors became constitutional officers for 17 days. They took an oath to do impartial justice; they did.

The House has already enjoyed unprecedented advantage in the reinvestigation of these charges. The suggestion that they should be permitted to avoid their responsibility and dilute the accused's rights further in the name of efficiency, speed, political expediency, is not fair. It is wrong.

If there is to be a trial, the managers must again assume the burdens the prosecutors assumed in 1983, the burdens that managers of the House have assumed in trials of impeachment throughout history.

If there is to be a trial, Judge Hastings must be accorded at least those protections he was accorded in 1983, and the protections that have been accorded acquitted accused, although there have been none, in trials of impeachment throughout history.

If there is to be a trial, the Senators must execute their special oaths as fully as did Debi McMullen and her fellow jurors in 1983 and as fully as have their predecessors in trials of impeachment throughout history.

Second, the managers have maintained throughout, and today, that the House holds a continuing monopoly over the evidence it received from other branches as well as that gathered by the staff.

The managers have recently asserted a matter that was not discussed today that the House may continue to use its subpoena power to enable their staff to conduct ex parte inquiries and depositions to gather further evidence.

If there is in this room a former prosecutor, the notion that a U.S. Attorney could use the grand jury subpoena power after the indictment was filed to perfect its case without disclosure to the defense or the court should be a proposition so shocking as to end discussion about the extent to which we are following precedent here.

In the managers' view, the right of the accused official to be informed of the evidence is a matter the Constitution leaves to their mercy. That is wrong. If there is a trial, and it is to be a fair trial, Judge Hastings is entitled to access to the full deck.

He should not have to bid on stipulations. When one side has 52 cards and he has only got a hand with—I do not care whether it is 48—the odds are shifted. He and his counsel must be given time to analyze and evaluate the materials that have been withheld, materials the managers have received, gathered, analyzed and evaluated over almost two years. He must be given access to the Senate subpoena power before the trial to gather such additional information as may remain and be necessary for his defense. That is necessary to assure a trial that is orderly as well as fair.

Third, and this is unprecedented, I make an unprecedented request. My other points, I think, are well established. But if the trial of this impeachment is to be fair, the Senate must provide funds for the defense.

The Constitution guarantees that a judge's compensation in office may not be diminished, and that protection was to prevent Congress, executive officers, other judges from placing a man's salary or compensation.

Now, whether that guarantee requires that funds be provided to pay for the defense that produced Judge Hastings' acquittal in 1983, that is not before you. Whether that guarantee requires that funds be provided to pay for the costs and liabilities Judge Hastings has been forced to bear over the six succeeding years is not before you.

What is before you is the fact that for seven years, officials in all three branches have taken actions that have diminished Judge Hastings' compensation and have imposed annual liabilities far in excess of that compensation.

What is before you is the fact that the House demands that this judge be tried a second time on accusations a jury rejected. If the principles of double jeopardy, speedy trial, and fundamental fairness do not preclude a second trial of an accused judge, then surely principles of decency and fairness, as well as those embodied in the compensation clause, require that funds be provided for the defense of an acquitted judge who is called upon to defend himself at a second trial six years after the fact.

Funds must be provided for the defense in this trial of impeachment if the trial is to be fair.

Mr. Chairman and members of the Committee, we have a fine written Constitution in this Nation. The Soviet Union and most countries have fine written constitutions. They embody protections for the individual. Read the Soviet constitution; it is a lovely document.

For 200 years, we have had a difference in this country. We have honored the words in our Constitution even when it was not efficient or expedient. Douglas MacArthur said it in his farewell address. He said it so simply that my children, your children, our fellow citizens, you and I all can understand: Duty, honor, country.

The Constitution imposes the duty on every Senator to be fair and impartial, to do justice. But more than that, every Senator pledged his or her honor when they took the oath to do impartial justice in all things appertaining to the trial of the impeachment of this man. That was a sacred pledge.

Mr. Chairman, I ask this committee to recommend procedures that comport with the Constitutional duty. I ask you to recommend procedures that will enable each Senator to redeem the honor pledged, and so to maintain the tradition of an honorable Senate, a tradition built not in this session, not in the last, but over 200 years.

I ask this not in the name of Alcee L. Hastings alone. I ask it also in the name of a great country that has set itself apart by honoring its Constitution when it was tough, not just when it was convenient.

Thank you for your time and attention.

The CHAIRMAN. Thank you, Mr. Anderson. [Applause.]

Mr. Anderson, assuming that this committee recommends that the full Senate hear this proceeding, what length of time do you think the trial might take? Do you have a ballpark estimate?

Mr. ANDERSON. Mr. Chairman, it is awfully difficult because we know the original trial took 17 days. The House managers now say that their side alone would take 17 days.

The CHAIRMAN. I think they estimate 12 to 15 days for testimony.

Mr. ANDERSON. Well, 15 days. The defense will need a comparable amount of time, and when we finally know what is new, we will have to do it. Let me give you an illustration of why this is so hard, Mr. Chairman. Let me represent to you so no one is ever misled.

I do not consider it my job to ease your burden. I do not consider it my job in court; I do not consider it anywhere. On the other hand, I realize that any lawyer irritates the judge by imposing needless burdens at his client's expense, and none of us intend to do that.

You have before you in the articles an allegation that the conspiracy, in fact, began some time prior to July 1981. The government chose for a specific reason to allege that it began on or about September 10th.

The reason was they had cut a deal with the informant that he would never be called. They may have had other tactical reasons; I do not know. The House has repudiated, or the Judiciary repudiated that deal. We now have William Dredge, at least what purports to be a copy of his testimony at a proceeding where neither I nor the judge nor anyone else was present.

We have a mass of telephone records and message pads. We have an allegation that says the agreement began before July. We do not have William Dredge on the witness list. Now, if you talk about telephone records and my willingness to stipulate, I am sure that Mr. John Doar went out and gathered them. I am sure that Mr. Baron has gone out and gathered a lot of telephone records. I was not there for the gathering.

Those hearings they talk about which leave everything unchallenged were done without me, without the judge. William Dredge's phone records, to give you an illustration, are listed in the name of someone named Bill Schlosser. I do not know who Bill Schlosser is. I do not know how it got in that pseudonym; I do not know what it means.

I do know that Bill Dredge is a thief, a fence, a convicted drug dealer who came in with this information to cut a deal so that he could get out of a major drug conspiracy. William Dredge is not going to be there; his phone records are going to be there. There are not going to be stipulations that that man exists until I see him with my own eyes.

You ask me how long it will be. The House has proposed a moderate witness list and says it is going to take 15 days. William Dredge is not on it. I do not know whether that is going to be a decision they make later or whether it is going to be something on the evidence.

I cannot answer your question until I am comfortable, and the best I can tell you right now is this is as burdensome or more burdensome on the judge. We wish to see it come to an end. I would doubt that we would take more time than the House consumes. So if they say 15 days, I would say we need 15 days.

The CHAIRMAN. Senator Stevens.

Senator STEVENS. Mr. Chairman, I appreciate the problem the professor has in presenting his request to this committee, but we are not sitting as judges either. I would like to make sure we all understand what we are doing, so let me read the Constitutional provision to everyone concerning impeachments.

> The Senate shall have the sole power to try all impeachments. When sitting for that purpose, they shall be on oath or affirmation. When the President of the United States is tried, the Chief Justice shall preside, and no person shall be convicted without the concurrence of two-thirds of the members present. Judgments in cases of impeachment shall not extend further than to removal from office and disqualification to hold and enjoy any office of honor, trust, or profit under the United States. But the party convicted shall, nevertheless, be liable and subject to indictment, trial, judgement and punishment according to law.

Now, that language is plain to me. I am an ex-federal prosecutor. I spent a lot of time trying criminal cases. This is not a criminal case. You could not convict anybody on two-thirds of the vote of a jury sworn in a federal criminal matter. You could not try someone who had been tried on the same set of facts once before. This is not a criminal proceeding and we should not allow the notion it is.

I hope, Mr. Chairman, that we will proceed and make a recommendation to the Senate soon. I have no questions.

The CHAIRMAN. Senator Pell.

Senator PELL. I have no questions.

The CHAIRMAN. Senator Hatfield.

Senator HATFIELD. No questions.

The CHAIRMAN. Senator Adams.

Senator ADAMS. No questions.

The CHAIRMAN. Senator Helms.

Senator HELMS. No questions.

The CHAIRMAN. Well, we thank you, Mr. Anderson, and Judge Hastings, and co-counsel. We will consider all the facts. We will have all the transcript tomorrow and we will begin to make our judgment.

Fairness is in the eye of the beholder. I will do the best I can under the sworn oath that I have given to make a judgment that I personally consider fair. Now, whether you consider it fair or not is another question. I saw a little smile on your lips.

That is the procedure. I am going to make my judgment based on what I have heard today and the documentation that you have given us and what we have heard from the so-called prosecutors in this case.

We will make a judgment and try to do it next week so there will not be any accusation that we have tried to hold up the proceedings and so we will have complied with the resolution. We will make recommendations to the Senate as to what they may or may not do. We recommend to the Senate. They may not accept what we recommend, but that is their judgment.

Without further ado, we thank you and we will try to hold a meeting early next week and make our recommendation to the Senate.

[The statement of Mr. Anderson follows:]

STATEMENT OF TERENCE J. ANDERSON ON BEHALF
OF U.S. DISTRICT JUDGE ALCEE L. HASTINGS

Mr. Chairman and members of the Committee, there are four propositions before you whose truths should be self-evident:

1. The trial of *this* impeachment must be conducted before the full Senate; a committee will not do.

2. The House, through its managers, must carry the burden of competently proving its accusations; neither they nor the Senate may properly call upon the *accused* to ease that burden; the suggested stipulation process will not do.

3. Judge Hastings must be assured access to the full deck and the power to gather evidence necessary for his defense; the House's claim to hold a continuing monopoly over access to the evidence and the subpoena power will not do.

4. Fairness requires that the Senate provide funds and time sufficient for a proper defense; Judge Hastings has borne burdens too heavy, too long, and that will not do.

The materials before you suggest that none of these propositions is self-evident to my colleagues representing the House. I hope I will have the opportunity to satisfy you of their truth this morning, because in my view the central issue is also self-evident:

> Should the Senate, in this case of impeachment, sell its constitutional soul and honorable traditions, as well as a judge's rights, in exchange for efficiency and political expediency?

I hope the answer is self-evident -- at the end of the morning, if not now. But let me begin with some basics.

Cases of impeachment are criminal cases. They are cases in which the House prosecutes a citizen who has been entrusted with an office of trust and honor by the United States. The House alleges, *and must prove*, that the accused is guilty of "Treason, Bribery, or other high Crimes and Misdemeanors." The Senate does not remove the officer from office; it convicts or acquits the officer; removal is merely established as the punishment that follows automatically upon the entry of a judgment of conviction. But the Senate has discretion to punish further. It may order that the convicted citizen be forever barred from holding "any office of honor, Trust or Profit under the United States." And for one who has held a position of high honor, that was

intended as and remains a punishment more severe than death, as surely the members of this honorable body must know.

The Constitution entrusted the power to *try* cases of impeachment to the Senate because these criminal cases were the most serious and important species of criminal cases -- too serious and too important to be entrusted to the courts. But with that awesome power, the Constitution entrusted also an awesome responsibility: The Senate must set aside the legislative business and conduct a trial -- a trial that affords the House an opportunity to prove its accusations, and a trial that affords the accused the rights and protections afforded all who are accused of committing high crimes and misdemeanors. The Senate must set aside the legislative process also, for upon each of its members is conferred the power that God conferred upon Solomon -- the power to do judgment. On the day of judgment, each Senator must execute the special oath taken and judge whether the evidence has proved that the accused was guilty of the high crimes alleged.

My children, your children, our fellow citizens, you and I: We all know the essential characteristics of a criminal trial. The accuser must be afforded an adequate opportunity to present competent testimony and other evidence in support of its accusations. This must be done in the presence of the jurors who will decide the case. The accused must be afforded the opportunity to confront the witness and the other evidence. This must be done in the presence of the jurors who will decide the case. He must be allowed to confront and cross-examine the witnesses in the presence of the jurors so that their demeanor and credibility may be observed. He must be allowed to object, so that improper testimony and evidence may be excluded and never permitted to infect the jurors' minds. He must be afforded the opportunity to challenge his accuser's evidence as inadequate, when the prosecutors rest.

My children, your children, our fellow citizens, you and I: We all know that it is only *after* the accuser has met its initial burden that the accused must, for the first time, assume the burden of proceeding. Then and only then may the accused be properly called upon to present evidence in support of his innocence. And when all the proper evidence from both sides has been *heard* and *seen*, there is a further step that must be taken. The accuser and the accused must be afforded a fair opportunity to review and comment upon testimony still fresh in the jurors' minds. They must be permitted to engage the jurors and the evidence in order to persuade the jurors where truth lies, where justice may be found.

My children, your children, our fellow citizens, you and I: We all know that all this must be done under the gaze of the public. The accused must have a public trial. The public, not just the parties, are entitled to watch in order to satisfy themselves that the jurors paid proper attention to the testimony and other evidence. Jurors and

judges must be held accountable for having done the job right: How else can the Nation or the parties have confidence in the outcome?

And it is only after the job has been done right, and has been seen to have been done right, that the jurors are permitted to retire from public scrutiny and deliberate upon the evidence, as each heard and saw it. It is only from such deliberation, among those with equal knowledge, that judgments that are just to the accuser, just to the accused, and just to the public may come.

The Senators must assume Solomon's burden in this case of impeachment. They must exercise the power of judgment. They must execute the duties imposed upon them by the Constitution, by their oaths of office, and by the special oath they took to do impartial justice in all things appertaining to the trial of this impeachment. If there is to be a trial, a trial that is fair, the Senators, not their staffs, must pass judgment based upon the testimony and evidence. Those who would pass judgment on Alcee L. Hastings must do, and must be seen to do, what the jurors who passed judgment six years ago did and were seen to have done.

Mr. Chairman, the tape I brought bears directly on these points and may easily substitute for several thousand of my words. It is self-explanatory, and I would ask that it be shown now:

* * *

[The following is the transcript of an edited panel discussion prepared as part of a weekly television show, "You and the Law" produced by Tally-Ho Productions, Inc. It was recorded last September. It is presented with permission.]

BRET S. CLARK: Hello, and welcome once again to "You and the Law." Today, we have a very special topic and a very special set of guests. We are going to be discussing the trial of Alcee Hastings, the second trial of Alcee Hastings, the judge who currently sits on the bench for the United States District Court for the Southern District of Florida. Joining us is Judge Alcee Hastings. Hello, Judge.

JUDGE HASTINGS: My pleasure being here with you.

CLARK: . . . Also joining us is a very special guest, Debi McMullen. Debi was a juror on Judge Hastings's criminal trial here in Miami, and she is also a private investigator.

DEBI MCMULLEN: Yes. . . .

CLARK: Also joining us is Lou Salome who is the editor of the Miami News editorial page.

LOU SALOME: That's right, Bret. . . .

CLARK: Are you going to ask for a trial before the full Senate?

HASTINGS: We have already asked, and we will continue to do so. I think the Constitution

pretty much mandates two things. The Senate has the power to make its own rules. There's no question about that. But the Constitution seems to discuss impeachment in the light that I think the dignity and grace of it requires, and decency requires, and that is as something extraordinary. And even though it is cumbersome and burdensome, I think it is the responsibility of the full United States Senate to sit as jurors the same as Ms. McMullen's full twelve jurors had the full responsibility. Absent that, I think it would have been atrocious had she been among three jurors to hear, see, and determine evidence, and then discuss it with the other nine. Liken it to that, and I believe that the full Senate should sit. . . .

CLARK: There has been a lot of discussion, back and forth, about double jeopardy, and the argument is made the issue of double jeopardy does not apply because we are talking about a judge and whether he has the right to continue being a judge and not whether his case was resolved favorably to him, which it was, in the criminal courts. Do you have a response to that?

HASTINGS: . . . What we have in this particular case is a case of first impression. Never before has an acquitted judge been confronted with virtually the same matters in the impeachment forum. So to answer your question, I borrow from James Kilpatrick. It's double jeopardy in fact, if it's not double jeopardy in law. . . .

CLARK: I am going to go to Mr. Salome in a minute, but I want to ask you one more question, and that is Judge Claiborne . . . In that trial, he did not get all 100 Senators.

HASTINGS: No, he did not. . . . Along comes Judge Claiborne, and they decide, "Hey, you know twelve of us can hear this evidence and report to the others." Well, Senator Heflin from Alabama said that there were at least thirty-five Senators, when they voted to remove that man, who did not know one thing at all about what had gone on. Now that is wrong. But what happened in Claiborne's case -- it was no presumption -- what was happening is the machinery was being oiled for Al Hastings. That is what was happening in the Claiborne case.

CLARK: Mr. Salome, do you have a response to some of the things the judge has to say?

SALOME: It's not a matter of a response. I think it is a matter of a comment. I think that the Senate, in this case the entire Senate, should hear this case. No question about it. . . . I do not think it is fair to take a committee of twelve and to go through the exercise that the Senate

went through with Judge Claiborne. I think that was a different case because of the conviction. I think you could get away with it then. At the same time, I do not think you can get away with it in this case. I do not think the Senate should try.

And also I think that the law, the Constitution, ought to be changed because the Senate really cannot function as a committee of the whole and conduct this kind or any kind of an impeachment trial. It is impossible in this day and age. At the time the Constitution was written, the Senate could take a month, a month-and-a-half, and conduct this kind of a trial and not really miss out on a lot of other business. It is not possible today. So you have got to go, perhaps, to a committee system, but it has got to be done with a constitutional amendment, and it cannot be done in time for Judge Hastings's trial. So, the alternative, in my opinion, is to do it right and do it fairly, and to do it, the whole Senate must do it, no matter what it takes.

CLARK: What about the issue of double jeopardy? It may be legally in doubt as to whether that applies or not, but you have a juror sitting here who went through a trial, seventeen days of a trial, and now you have another trial. They are just sort of saying, "Well, the jurors are wrong; they do not know what they are talking about."

SALOME: This is where the whole matter gets a lot more complicated than just talking about the Senate. I think, if I were a juror, as Debi was, or if I were the judge, I would feel the same way -- that it is double jeopardy. But looking at it as more of a disinterested observer, I would say that technically it is not, but in a practical sense it has that effect. I think that the impeachment standard is different from the trial standard, the criminal standard. There is no question about that.

The form that this whole proceeding has taken, the manner in which it has evolved from the acquittal right on to where we are today, in fact from the investigation right on to where we are today, is a very troubling thing to me. You know you could recite the whole case, and I am sure the judge could do it better than I. The manner in which the case was pursued in an investigative fashion, with the money not being allowed to go as far as it might have gone to be absolutely sure that there was a bribery conspiracy taking place -- the explanation that I read about why that did not occur is not satisfactory to me.

Judge Hastings's career on the bench as somewhat of an adversary to the government in certain types of cases at the time, or just before, the investigation was started -- all is troubling. The persistence and the singlemindedness of the judiciary and the investigators they hired and so on to take this case all the way to where it has gone today -- it bothers me. The form is very much a part of the substance of the case, and yet they are separate. That makes it very, very difficult to come to a judgment that you really feel comfortable with.

CLARK: Do you think that maybe some of these judges think that the Judge is a little too outspoken? That maybe his demeanor does not befit another federal judge?

SALOME: I do not think you can say that of everybody involved in this case. I cannot say it because I do not know for one thing. But I would feel that, people being people, there has to be a good deal of resentment toward Judge Hastings for the way he conducts his court, for the kind of a person that he is outside the court. Speaking to groups, commenting on social issues and in the process, alluding to, implicitly commenting on, political issues because it is hard to separate social from political -- I think all that makes the judiciary as a rule very uncomfortable with him, and I think that is a factor in it. . . .

CLARK: Debi, how do you feel as a juror, seeing and watching on T.V., the man that you acquitted being put to the grinder again and being retried. Do you think that that is fair?

MCMULLEN: No, it is not fair, like you were saying. We came to a decision, and we were a very good jury. We were sequestered. We did not have anything to do, except think about this case. We even went in on Saturdays for half a day. We could not see our families, nothing. We did everything by the book: We did not talk about the case until deliberations -- right down the line.

We came to a decision, it was the only decision that could have come to pass because the prosecution did not have enough evidence. So, we gave that decision, and then a few weeks later I hear that a bunch of judges are going to start these impeachment proceedings. That is not fair. Maybe they do not like him for something, and a lot of stuff did come out about how he had run his court and everything. I thought maybe they were a little embarrassed about that -- you know, that he relies on his law clerks. The prosecution tried to ridicule him for that. . . .

CLARK: In the trial, they tried to ridicule him. . . . for making what really is an honest statement about the way judges, who obviously do not have time, do everything? . . .

MCMULLEN: Right, right. Then suddenly this came to pass. I could not believe it, and that it has gotten this far has surprised me. I thought eventually, maybe the judges' motion would not go through. But it just keeps going; it keeps getting worse and worse. Why did I waste my time? . . .

CLARK: I want to get back to something that is overlooked a lot when we discuss this case, and that is the facts. Are you guilty or are you not guilty?

HASTINGS: Absolutely not. I think that my best judge of that is sitting here.

I did not take the witness stand and fail to point out those things that I thought were weaknesses. I went to dinner. I went to Washington. I made phone calls. I might add the only thing different -- and I want her to be comfortable about this -- the only thing different is that I made a mistake during the course of that trial about four telephone calls. That is the only thing different at this point. . . .

But what Ms. McMullen heard as a juror, the prosecutor either had what the Congress has or did use everything. You ask her. He argued to her that the letters were fabricated. He argued to her that I came home because I was trying to get away from the FBI. He argued to her, as a matter of fact, about the phone calls. He argued to her that I did not make certain phone calls. He argued to her that I went to the Fontainebleau as a show up with Bill Borders, and if I am mistaken ask her. She is sitting right here.

CLARK: Let's do that. When you were sitting there and looking at the facts and you heard the lawyers giving their arguments, was there a struggle going on there, and people saying, "He is guilty; he must be guilty for them to bring charges." What was going on in the jury?

MCMULLEN: Well, nothing went on until deliberations because we were not allowed to discuss the case.

CLARK: Okay.

MCMULLEN: During the course of the trial, you did get kind of swayed, back and forth, between. Then you finally got all the evidence. By the time we got all the evidence, it was three weeks into it. We were trying to recall what happened at the beginning of the trial, so that is why it took us so long.

We had to review some testimony, and we did, kind of, pick over his testimony quite a lot. We tried to see if there was -- because, if you catch somebody in one lie, you can assume that they are lying through the whole thing. We picked it apart, and we could not find anything that proved to us. We even, at one point, called one of his law clerk's testimony up because he was saying that there was a telephone call. She said there was a telephone call. The government said there was not a telephone call. And so we pulled that up to verify, and we said, "Well, she says there was one; she's got no reason to lie." And we finally came to the conclusion that this was not enough evidence to convict anybody of anything.

CLARK: But was it a question of a very strict legal standard? "The judge instructed us, and it is very strict, and you can't find him guilty unless you meet this strict standard," and you just felt that there wasn't enough evidence to meet that standard. Or, in your hearts, were you convinced that there just was not really anything to it?

MCMULLEN: I cannot speak for everybody else, but I know some of us felt that there was -- I mean, we are not even talking reasonable doubt, we are talking a lot of doubt.

CLARK: A lot of doubt. Out of all the people in the universe, you are one of the very select few that really saw all the evidence and that can comment fairly because you have no ties to Judge Hastings or anything else. What really is there? What is the government's case? What do they have?

MCMULLEN: Circumstantial evidence that was shaky at best and an investigation that did not finish; it never got to where it was supposed to go.

CLARK: Explain that for the audience, because a lot of people were talking about the airport and what happened there, but some people. . .

MCMULLEN: Well, that was not even in the part that I am talking about. I am talking about the fact that the person, the ex-FBI agent that they set up to do this little bribe, to deal with Mr. Borders -- instead of wiring him to do the transaction, they wired his room. Then Bill Borders said, "Let's go for a ride." Then everybody panicked, and it all quit right then.

CLARK: And then they terminated the investigation.

SALOME: If you are trying to convict a federal judge, I think you have an obligation to not worry about whether you are going to lose $150,000

or whatever. You go, and you do it. They do it with a lot less important matters than that. . . .

HASTINGS: . . . Now what gives Congress the right to think that they are any better prepared than Ms. McMullen, who saw and heard it all. The big question becomes, whenever they hold the Senate trial, how can I reconstruct the events that she saw? And how fair is it, if I cannot reconstruct it? You want to know something? Some of the witnesses are dead already. The Romano brothers are dead. My uncle, who is a crucial witness, is dead in this particular matter. It is just not right. I will take her verdict and be satisfied. If we want to have the American people have trust in the cornerstone of justice, the jury system, I suspect that that is the best approach. . . .

CLARK: We have about ten seconds left, Debi. Do you have a last word?

MCMULLEN: Well, this might be a bizarre comparison, but to me you have somebody who got acquitted and now they are being persecuted again. You know the system is working against them.

CLARK: Something's wrong. Thank you very much. Thank you for being here.

* * *

Mr. Chairman and members of the Committee, I thank you for letting me be here. When I finish, the managers will know, I will know, you will know, and all who care will know that you have *heard* me and that you have *seen* me. You will have *heard* me tell what I think fairness to Judge Hastings requires and why. You will have had the opportunity to *confront* me. Through your questions, you will have had the opportunity to *cross-examine* me in order to resolve any ambiguities in my testimony or prior memoranda that may concern you. You will have had the opportunity to test the quality of my statements and, more important, to plumb the depth and test the sincerity of my conviction.

When that process is done, every member present will be in a better position to participate in the debate that should follow and to pass judgment on the issues before you. Your position will be better because the House will know you have *heard* its managers' views directly, not filtered through staff, not through mere written summaries. The judge will know that you have *heard* me. But most important, citizens who care will have seen those they elected to do the job, doing some part of the job. Neither they nor we can doubt the heavy reliance you have placed and will place upon your staffs in this process, but they and we will know you *heard* and *saw* before you decided. That may suffice for this day, for you are not sitting in the trial of this impeachment. But the Constitution and a Senator's solemn oath will require more, far more than that, if the *trial* of this impeachment is to do impartial justice.

If there is to be a trial of Alcee L. Hastings, we ask that every member of the Senate who would be present on the day of judgment also be present:

> -- To *hear* the opening statements, so that the managers and counsel for the judge may preview and structure the evidence in order that the jurors may better understand and evaluate the evidence as it is presented;
>
> -- To *hear* and *see* the witnesses as they testify, to hear and see *all* the witnesses;
>
> -- To *observe* them when they are confronted;
>
> -- To *evaluate* the quality of their recollections, the conviction with which they are held, and the sincerity with which they are expressed;
>
> -- To *see* the other evidence in the context in which it is presented, and to *hear* the witnesses through whom it is presented.

If there is to be a trial, a trial that is fair, every Senator must do what Debi McMullen and her fellow jurors did.

A stale printed record can only be a transcription of words that were said, but not heard, with separate volumes of exhibits, neatly bound, but far separated from the testimony through which they were presented. That will not do in this case. It will not do at all. If there is to be a trial at all, it must be trial by the Senate, the full Senate: If the trial is to be fair.

Mr. Chairman and members of the Committee, I return to where I started: The three additional truths I mentioned must also be recognized, if the trial of this impeachment is to do, and to be seen to do, impartial justice to Alcee L. Hastings.

First: The managers have submitted a last-minute proposal to further dilute the protections traditionally accorded the accused in the trial of an impeachment. Their staff has prepared voluminous proposed stipulations drawn from the Statement of Information their staff prepared before the House conducted its hearings. The managers now suggest that the burden be shifted to Judge Hastings, before the trial begins, to show what basis he has to refute their staff's claims. That will not do.

The House had its opportunity to formulate the accusations in such detail as it chose in the Articles of Impeachment. Judge Hastings has responded. The managers have replied. The facts in dispute are now defined. The managers must now recognize that they, not their staff, must carry the full burden the House assumed. They must make good the accusations by presenting competent testimony and other evidence. When they rest, then and only then may Judge Hastings be called upon to decide whether and what competent evidence should be produced in his defense.

That was the burden the prosecutors assumed the last time these accusations were tried. That is the procedure that was followed. Debi McMullen and eleven other citizens became constitutional officers and took an oath to do impar-

tial justice there. They did. The House has already enjoyed unprecedented advantage in conducting a reinvestigation. The suggestion that they should be permitted to avoid their responsibility and dilute the accused's rights further is wrong.

If there is to be a trial, the managers must again assume the burdens the prosecutors assumed in 1983, the burden that managers for the House have assumed in trials of impeachment throughout history. If there is to be a trial, Judge Hastings must be accorded at least those protections that he was accorded in 1983 and the protections that have been accorded the accused in trials of impeachment throughout history. If there is to be a trial, the Senators must execute their oaths as fully as did Debi McMullen and her fellow jurors in 1983 and as fully as have Senators in trials of impeachment throughout history.

Second: The managers have maintained throughout that the House holds monopoly power over the evidence they received from other branches as well as that gathered by its staff. The managers have recently asserted that they may use the House's subpoena power to enable their staff to conduct continuing *ex parte* inquiries and depositions, without notice to the accused, in order to gather additional evidence in preparation for trial. In the managers' view, the right of an accused official to be informed of the evidence is a matter that the Constitution leaves to the mercy of his accuser. That is wrong.

If there is to be a trial, a trial that is fair, Judge Hastings must be given access to the full deck. He must and his counsel must be given time to analyze and evaluate the materials that the managers have received, gathered, analyzed, and evaluated over a period of almost two years, but have withheld from him to this date. He must be given access to the Senate's subpoena power before trial to gather such additional evidence as may remain and be necessary for his defense. That is necessary to assure a trial that is orderly as well as fair.

Third: If the trial of this impeachment is to be fair, the Senate must provide funds for the defense. The Constitution guarantees that a judge's compensation in office may not be diminished. Whether that guarantee requires that funds be provided to pay for the defense that produced Judge Hastings's acquittal in 1983 is not before you. Whether that guarantee requires that funds be provided to pay for costs and liabilities that Judge Hastings has been forced to bear over the six succeeding years is not before you.

What is before you is the fact that for seven years officials in all three branches have taken actions that have diminished Judge Hastings's compensation in office and that have imposed annual liabilities far in excess of that compensation. What is before you is the fact that the House demands that Judge Hastings be tried a second time on accusations a jury rejected. If the principles of double jeop-

ardy, speedy trial, and fundamental fairness do not preclude a second trial of an accused judge, then surely principles of decency and fairness, as well as those embodied in the Compensation Clause, require that funds be provided for the defense of an acquitted judge who is called upon to defend himself at a second trial. Funds must be provided for the defense in the trial of this impeachment, if the trial is to be fair.

Mr. Chairman and members of the Committee, the late General MacArthur said it best in his farewell address. He said it so simply that my children, your children, our fellow citizens, you and I -- all can understand: "Duty, Honor, Country." The Constitution imposes the duty upon every Senator -- be fair and do impartial justice. The honor of every Senator was pledged as each took the oath to do impartial justice in *all things appertaining to the trial of this impeachment*. I ask this Committee to recommend procedures for the trial of this impeachment that comport with that duty; procedures that will enable each Senator to redeem the honor pledged, and so to maintain the tradition of an honorable Senate, a tradition built over 200 years. I ask this not just in the name of Alcee L. Hastings; I ask it also in the name of our country.

The CHAIRMAN. This hearing is adjourned.

[Whereupon, at 11:26 a.m., the Committee was adjourned.]

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